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IN THE MATTER OF THE PETITION OF R. E. TWIDALE.

not been admitted as a Solicitor anywhere. He applied for leave to practise at this bar. His Counsel, Sir Roundell Palmer (Lord Selborne) put the case very much as Mr. Doyne has done. Lord Cairns, on behalf of the Committee, said in that case "the qualifications are in the Schedule." That means in the Orders I suppose; it is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to Solicitors practising in India." Then Sir Roundell Palmer said "yes, I see there are affirmative words which do not embrace this case: I do not perceive that there are any negative words which would exclude it." Well that is precisely the argument which Mr. Doyne put at the bar here. The answer to this is, "Lord Cairns:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakils who are under very different jurisdictions, but certainly they are not included at present in the Order." That (as will be seen) is exactly in point.

Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition, if it were within their power. But it has been expressly decided that it is not within their power, and their Lordships now must follow that decision, and refuse the application.

Petition rejected.

Solicitors for the petitioner: Messrs. *T. L. Wilson and Co.*

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

1889
May 21.

MOHESH CHUNDER CHUTTOPADHYA (DEFENDANT) *v.* UMA-TARA DEBY (PLAINTIFF).*

Appeal—Bengal Tenancy Act (VIII of 1885), s. 153—Cesses, Suit for—Bengal Act (IX of 1880), s. 47—Appeal in cases under Rs. 100.

A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals.

* Appeal from Appellate Decree No. 1545 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 27th of June 1888, reversing the decree of Baboo Dino Nath Sircar, Munsiff of Baruipore, dated the 31st of December 1887.

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MOHESH CHUNDER CHUTTOPADHYA v. UMATARA DEBY.

THIS was a suit for cesses.

The defendant admitted the tenancy, but contended that as no valuation of the tenure, since his holding had commenced, had been made by the Collector, he was not therefore liable to pay any cesses.

The Munsiff dismissed the suit. On appeal the District Judge reversed the Munsiff's decision and gave the plaintiff a decree for the amount claimed which was a sum under Rs. 100.

The defendants appealed to the High Court.

Baboo *Nil Madhub Bose*, for the respondent, took the preliminary objection that, under s. 153 of the Rent Act, there was no appeal, the suit being in reality one for rent, cesses being recoverable as rent under Bengal Act IX of 1880, s. 47, and the word "rent" in cl. 5, s. 3 of the Bengal Tenancy Act, being defined as "money recoverable under any enactment for the time being in force as if it was rent."

Baboo *Sharoda Churn Mitter* for the appellant.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

GORDON, J.—We think that the preliminary objection taken by the respondent in this case, that no appeal lies, must prevail. The appeal arises out of a claim for cesses less than Rs. 100, which, under s. 47 of the Cess Act (Bengal Act VIII of 1880), are made recoverable in the same way as an arrear of rent. And, under the definition of rent given in cl. 5 of s. 3 of the Bengal Tenancy Act (Act VIII of 1885), rent "includes also money recoverable under any enactment for the time being in force as if it was rent." That being so, the suit is really a suit for rent; and as the defendant has raised no question in his written statement as to the amount of cess which is payable by him to the plaintiff, no dispute has been decided between the parties which would have the effect of bringing the case under the provision of para. 4 of s. 153 of the Bengal Tenancy Act. We think the case does not fall within that paragraph, and that, consequently, no appeal lies to this Court. That being so, this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

PROSONNA COOMAR SINGHA (ONE OF THE DEFENDANTS) v. RAM COOMAR GHOSE (PLAINTIFF).*

1889 *May* 28.

Right of user—License to use land of another, coupled with grant—Revocation of License—Right of licensee to damages.

A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract. *Wood* v. *Leadbitter* (1) applied.

SUIT for declaration of right over a plot of land and for an injunction.

The plaintiff claimed, under a solenamah entered into between himself and the defendant, to have the use of a plot of land belonging to the defendant as his privy; the defendant admitted the solenamah, but objected to the use of the land for the purpose referred to, and contended that the solenamah was obtained from him whilst a minor, and that the suit was barred.

The Munsiff found that the land had been used by the plaintiff as alleged, that there was no defence to the suit, and granted a decree prohibiting the defendant from preventing the plaintiff using the land for the purpose alleged in his plaint.

The Subordinate Judge on appeal upheld this decree.

The defendant appealed to the High Court.

Mr. *H. Bell* (with him Baboo *Tarucknath Sen*) for the appellant contended that the license granted by defendant to the plaintiff was revocable at any time subject to a liability to pay damages. *Wood* v. *Leadbitter* (1).

Mr. *Twidale* and Baboo *Durga Mohun Das* for the respondent.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit by the plaintiff to have his rights declared under a contract made between him and the

* Appeal from Appellate decree No. 1449 of 1888 against the decree of Baboo Purno Chunder Shome, Subordinate Judge of Dacca, dated the 25th of May 1888, modifying the decree of Baboo Purno Chunder Chowdhry, Munsiff of Munsheegunge, dated the 19th of May 1887.

(1) 13 M. & W, 838.

defendants, and to obtain an injunction against the defendants restraining them from breaking the contract.

The contract is in respect of some land as to the ownership of which some years ago there was a dispute between the plaintiff and the defendants. That dispute was finally settled by the present plaintiff giving up all claim to the land, and admitting that it was the property of the defendants, and in consideration of his doing so the defendants agreed to allow him to go on to the land at all times for the purpose of using a particular corner of it as a privy. That went on for a great number of years apparently, but in course of time the defendants used this land for purposes inconsistent with its continued user in this way, and though the plaintiff might have gone on to the land and used it in the same way, he would have become a nuisance, and what he did would have become a nuisance, and it was under these circumstances that the defendants refused to allow him to go there any more for that purpose, and it is to assert this right that this action has been brought.

This action has been defended in the two lower Courts on various grounds. I should say that no claim was advanced for damages, but only for an injunction to compel the defendants to allow the plaintiff to use the land in this way. But the point was never made, until the matter came to this Court, that this was a license which was revocable at any time subject to the liability to pay damages. That point has been taken here, and we think it is a perfectly good one. The law, so far as we have been able to ascertain, is the same in this country as it is in England, there being so far as we can see no common law in this country on the subject and no statutory law either. The law in England is clearly laid down in the case of *Wood* v. *Leadbitter* (1). The Courts have acted upon the law as there laid down ever since, and it has always been held to be good law and binding upon them. That case decided that the license to go upon another man's land, unless coupled with a grant, was revocable at the will of the grantor, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied contract.

(1) 13 M. & W., 838.

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That being so, we think that the Munsiff and the learned Judge were both wrong in granting an injunction in this suit, but inasmuch as this point was not taken below, and there is no doubt about it that the defendant has acted in this case in a high-handed manner, he has revoked this license and has prohibited the plaintiff from using the land without offering compensation; therefore, although we think that this appeal must be decreed and the suit dismissed, we think that each party ought to bear his own costs all through. In the result then, this appeal will be decreed and the plaintiff's suit dismissed without costs.

Appeal allowed.

T. A. P.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

KRISTO BULLUV GHOSE AND OTHERS (DEFENDANTS) *v.* KRISTO LAL SINGH AND ANOTHER (PLAINTIFFS).*

1889. *May 29.*

Bengal Tenancy Act (VIII of 1885), s. 12—Transfer of a permanent tenure—Permanent tenure, Registration of.

The transfer of a permanent tenure under s. 12 of the Bengal Tenancy Act is complete as soon as the document is registered.

THIS was a suit brought by two putnidars to recover from their durputnidars rent from Bysack to Kartick 1292 and from Aughran 1292 to Kartick 1293, together with cesses.

The defendants admitted they held the durputni tenures up to the 1st Bysack 1293, on which date they sold the tenure to one Keshub Chunder Roy, whose name was duly registered in place of theirs in the Sherista of the putnidars. The deed of sale was duly registered and the putnidars fee duly deposited with the Sub-Registrar under s. 12 of the Bengal Tenancy Act. The notice under that section was however served on one only of the putnidars.

The Munsiff gave a decree to the plaintiffs for the rent claimed, holding that the notice under s. 12 was bad, it not having been served on both the plaintiffs.

* Appeal from Appellate Decree No. 1549 of 1888, against the decree of H. Anderson, Esq., Judge of Moorshedabad, dated the 8th of June, 1888, affirming the decree of Baboo Loke Nath Nundi, Munsiff of Kandi, dated the 26th of December 1887.

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The District Judge found that there was nothing in s. 12 which obliged the defendants to inform either the Sub-Registrar or the Collector of the names and addresses of their landlords, but said "I take it that the putnidars are clearly not bound to recognize any transfer of which they have not received due notice. Now granting for a moment that plaintiff No. 1 did receive notice, I think the Munsiff was quite right in holding that to be insufficient. There must, I hold, be a complete notice, *i.e.*, one which has been served on each landlord, not necessarily personally, but in the mode prescribed in rule 1 of chapter V of the Rules under the Bengal Tenancy Act (pp. 258, 259 of Rampini's and Finucane's 1st Edition);" and, after finding that the notice had not been served in accordance with this rule, he dismissed the appeal and confirmed the decision of the Munsiff.

The defendants appealed to the High Court, on the ground that the provisions of s. 12 had been sufficiently complied with.

Baboo *Rash Behari Ghose* and Baboo *Aushotosh Mukerjee* for the appellants.

Baboo *Troylucko Nath Mitter* for the respondents.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit brought by a landlord, who is the putnidar, to recover the rent of the durputni.

The answer which is made by the defendant is this,—He says: a part of the rent I owe you, and I have paid that into Court; as for the rest I am not liable to you, because at the time when that rent accrued I had transferred the durputni to a purchaser under the provisions of the Bengal Tenancy Act, ss. 11 and 12, and that transfer, so far as I was concerned, was complete.

The answer which the landlord makes to that is this,—He says: that is quite true, you did make the transfer you say, but I did not receive notice of it from the Collector, and therefore, notwithstanding the fact that you had transferred your interest, you are still liable for the rent, and the question for us to consider is that question.

Section 11 of the Bengal Tenancy Act provides that every permanent tenure shall be capable of being transferred. That

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may or may not be declaratory of the old law, but for the purpose of what I am going to say, that is the law that is created by that Act, and every such tenure is made transferable by the authority of that Act. Then comes s. 12, which limits the power of transfer. If it were not for s. 12, the transfer under s. 11 might be made in any way, either by an unregistered deed, or verbally; but s. 12 of the Act provides a limit, and the limit is this, that the transfer of permanent tenures can be made only by a registered instrument. In this particular case, it was made by an instrument which it is admitted was duly executed, and which it is also admitted was duly registered, and consequently the transfer from the vendor to the vendee was complete. Then come the other parts of the section, and sub-section 2 provides a condition precedent to the registration, that certain monies shall be paid by the vendor into the hands of the Registrar before he shall be entitled to the registration, but the registration concludes all that, because the registration could not take place unless those things had been done, and it is not disputed in this case that those things were done, so that the registration is absolutely complete.

Then comes another sub-section which provides what the Registrar is to do after the registration, how he is to dispose of the money in his hands, and what notices he is to give of the fact of registration; but that seems to us to be a mere question as to how he is to deal with the matter and how the Collector is to deal with the money when it comes into his hands. But, so far as the transfer is concerned, the only thing which this Act says is necessary to complete it is registration. That was done, and it seems to me that the transfer was complete as soon as the document was registered.

Then is there any reason or possibility to say that, notwithstanding the fact that the transfer was complete, this man still remained liable to his landlord. The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceases to have any estate in the property, but that, in whatever way the transfer may be made, the liability remains on the original tenant, until notice has been given to the landlord,

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As to that, it is enough for us to say that the Act is absolutely silent upon the point, and we do not think that any such condition of things can be inferred from the provisions of the Act. If the Legislature had intended to impose any such limitation upon the right to transfer, we think they would have said so in so many words. They have not done so, and we think we cannot imply it from what they have said.

Under these circumstances we think that the Judge was wrong in the view he took of the law in this case, and this appeal must be decreed with costs.

Appeal decreed.

T. A. P.

Before Mr. Justice Pigot and Mr. Justice Rampini.

1889
May 14th.

GOLUCK NATH *alias* RAKHAL DAS CHUTTOPADHYA AND ANOTHER (PLAINTIFFS) *v.* KIRTI CHUNDER HALDAR (DEFENDANT).*

Second appeal—Practice—Finding of facts—Interference with finding of facts on second appeal.

As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case, has not been satisfactorily arrived at.

SUIT for declaration of title and khas possession.

This suit was brought for a declaration that the plaintiffs were entitled by right of inheritance to a plot of land, measuring 14 bigahs 6½ cottahs, and for possession of the same.

The plaintiffs alleged in their plaint that their father, Gopal Chunder Chuttopadhya, was in khas possession of the land; that, upon the death of their father, this piece of land as well as other lands and property left by him, were under the management of their mother, Troilokho Monee Debi; that in the month of Joisto 1290 (May 1883), the defendant, Kirti Chunder Haldar, who was in possession at the time, was requested by the plaintiff,

* Appeal from Appellate Decree No. 1394 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 21st of March 1888, reversing the decree of Baboo Janokee Nath Mukerjee, Munsiff of Diamond Harbour, dated the 16th of September 1887.

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Goluck Nath Chuttopadhya, to execute a kabuliat of the land, which the defendant refused to do on the ground that his father had purchased the land from Troilokho Monee Debi under a kobala dated the 15th Bysack 1285 (27th April 1879). The plaintiffs further alleged that the kobala was a fraudulent document; that there was no consideration for it; and that even if any consideration had passed, it was invalid as against the plaintiffs, inasmuch as they were minors at the time, and there was no legal necessity for the sale of the land by their mother, nor was the sale for their benefit. The defendant contended that in 1284 (1877-78) when Gopal Chunder, the plaintiffs' father, died, the defendant's father as Gopal's servant was in possession; that upon the death of Gopal, his widow Troilokho Monee, with the object of supporting her sons, the plaintiffs, of paying the arrears of rent for which the landlord had obtained a decree, and of meeting the expenses of her husband's shrad as well as other liabilities, sold the land in suit to the defendant's father for Rs. 175 under a kobala dated the 18th Bysack 1285; that the kobala was not fraudulent, and was for an adequate consideration; and that the sale was made by the plaintiffs' mother under a legal necessity for the benefit of her sons.

The Munsiff found that Troilokho Monee Debi had no sufficient reason for alienating the land, and that the sale therefore was not for the benefit of the plaintiffs. He also found that the consideration money had not been paid. In arriving at these findings, the Munsiff made the following observations:—

"The kobala of the defendant (Exhibit A) filed in the case purports to have been executed by Troilokho Monee Debi herself, on account of paying the arrear rent due to the landlord, and for meeting the expenses of supporting her two minor sons. She did not sign the kobala as guardian of the minors, and so far the sale does not appear to have been on account of the minor sons of Troilokho Monee. But this defect may be considered as a mere formal one, so I enter upon the merits of the case. In order to show that consideration passed for the kobala, and that it was executed for the benefit of the minors, the defendant examined four witnesses before the Court, and another of his witnesses was examined by Commission. The defendant himself

also gave his deposition in this case, and now let us see how far the defendant's plea is made out. The defendant himself deposed that, out of Rs. 157, the consideration payable under the kobala, Rs 65-7-6 were not paid by his father who made the purchase, and that it was kept by him to pay the arrears due to the landlord for 1284, and to satisfy a decree also of the landlord, of which a certified copy is filed in this case. This decree (Exhibit B) on perusal shows that the money due upon it was payable by instalments. The first of the instalments was payable in Magh 1284, the second in Magh 1285, and the third in the month of Magh 1286. The Exhibit C, which is a copy of the execution petition filed in Court by the landlord, shows that the instalment due on account of the first instalment was paid in Magh 1284, namely, before the date of defendant's father's purchase, and that the second instalment fell due long after the date of the kobala, so that, at the time of the execution of the sale-deed, the plaintiffs' mother was not pressed for money to pay the decretal debt, nor was it then possible for the defendant's father to guess what would be the debt under the decree with the cost of execution on the 5th September 1879, when he actually paid the debt due upon it. The debt upon the decree that was payable at the date of the kobala was Rs. 31-5-6 only. The landlord's dues on that date on account of the rent of the year 1284 were Rs. 10-10-6, with a trifling amount on account of interest and cesses. That the amount of arrears was no more is visible from the fact that the jama of the disputed land was Rs. 28-10-6 (See Exhibit B); and that out of this the plaintiffs' father did pay Rs. 18 (See Exhibit No. 3). This Exhibit is proved by the deposition of the defendant's witness No. 3. As the rent due on account of the disputed land for the year 1284 was a trifling amount, and as the decreed debt was not then payable, I am of opinion that the plaintiffs' mother had no sufficient reason to alienate the disputed land, and the sale was therefore evidently not for the benefit of the minors.

"As regards the passing of the consideration money on account of the kobala, I feel very great doubt. I have already commented upon the fact that the plaintiffs' father had no debt payable at the time the kobala was executed, and that the debt under the decree,

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and the arrears due respecting the rent of the disputed land, did not come up to Rs. 65 and odd annas, and that the defendant's father had no reason to keep back that amount out of the consideration money. There is also no proof of the payment of Rs. 3 paid as earnest money. The defendant and his witnesses, Nos. 1 and 2, no doubt deposed that Rs. 88-8-6 were paid to Troilokho Monee in cash during the time the kobala was executed, but there is some discrepancy on this point, the witness No. 2 deposing that no pice was paid, whereas the defendant stated that it did pass. The witness of the defendant, the writer of the deed, who was in a very bad state of health, and though present in Diamond Harbour, could not come up to Court, was examined upon Commission. He deposed that Troilokho Monee only took Rs. 15, and that the remainder of the purchase money was paid in the Registration Office to the plaintiffs' maternal uncle. This deposition strongly goes in opposition to the statements of the defendant's witnesses Nos. 1 and 2, and the passing of the consideration money seems to me to be very suspicious. The witness No. 1 of the plaintiffs is related to them, and the witness No. 2 is the father of their servant. Their deposition is also open to doubt on that account, and I hold that no consideration did pass for the deed of sale.

"It is true that the defendant's father is proved to have paid the rent of 1284 to the extent of Rs. 10 and odd annas, but being the person in possession of the land he was bound to pay it, and to pay also the decretal debt, which, if not paid, would have made his lands liable to sale for its own arrears. These payments were made long after the date of the purchase, showing that the defendant paid them to protect his land from sale. The payment of these sums do not, therefore, make out payment of consideration."

The Munsiff accordingly decreed the plaintiffs' suit.

The defendant appealed, and the Additional District Judge of the 24-Pergunahs reversed the Munsiff's decision. The judgment of the lower Appellate Court was as follows:—

"This was a suit to upset a sale effected by plaintiffs' mother and guardian, on the ground that no consideration passed for the transaction, and that it was against the minors' interest.

Plaintiffs do not directly assert that their mother did not execute the deed, and they have not called her as a witness. The execution has been fully proved, and the only point for decision is, was the sale valid? The Munsiff has found that it was not, and has decreed the suit. Defendant appeals.

"Admittedly defendant has been in possession of the land for ten years. The deed of sale is dated 15th Bysack 1285 (27th April 1878), and the suit was brought on 5th March 1887 (22nd Falgun 1292). Plaintiffs admit that defendant had the land before the alleged sale, for they say that their father let it to defendant. Now their father died in 1284. Defendant is in a difficult position in having to show how money was disposed of, which was paid by his father nine years ago. The sale was made by Troilokho Monee. She does not, at the top of the deed, describe herself as the guardian of the minors, but the body of the deed shows that it was in the capacity of the guardian that she sold the property, and for the benefit of the minors. The Privy Council case of *Watson & Co.* v. *Sham Lall Mitter* (1) shows that if there is any doubt as to the capacity in which a mother acts in such a case as this, it should be presumed that she did so in her lawful capacity. The defendant has proved by his own evidence and that of his witnesses that adequate consideration was paid for the deed. He has shown that his father kept back part of the purchase money, and discharged debts due by plaintiffs' father's estate, and that the rest went into the hands of Troilokho Monee. The landlord's petition to the effect that the first instalment of the kistibundi was paid on 23rd Magh 1284 is not, I think, evidence against defendant. Defendant produces a dakhila for payment of Rs. 30 odd on account of the rents of 1284: even if it be held that Rs. 18 of this were paid by Gopal Thakur, still Rs. 120 odd annas and not Rs. 10, as stated by the Munsiff, were paid by defendant's father. I do not know how the Munsiff came to the conclusion that this payment was made long after the purchase. The purchase was in Bysack 1285, and presumably the rent for 1284 was paid in Choit 1284 or Bysack 1285. The fact that other payments

(1) I. L. R., 15 Cal., 16.

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were made some time after the purchase, is consistent with defendant's evidence, and does not show that the sale was not for consideration. The Zemindar's gomashta deposes that Gopal Thakur was not in good circumstances, and so we need not be surprised that his widow found it necessary to raise money for the support of her children by selling some of the property.

"In my opinion defendant has proved that the sale was a valid one; that consideration was given; and that the sale was to the advantage of the minors.

"I attach no importance to the few discrepancies in the account of the witnesses to the sale. Such discrepancies must occur when witnesses are speaking to the mode of payment, and the distribution of money at a transaction which occurred about ten years before.

"Plaintiffs have failed to establish their allegations, and defendant has established his. I therefore reverse the decision of the Munsiff, and decree the appeal with costs; the result being that the suit is dismissed with costs of both Courts and interest at 6 per cent."

The plaintiffs appealed to the High Court.

Baboo *Baikant Nath Dass* for the appellants.

Baboo *Harendra Nath Mukerjee* for the respondent.

The judgment of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

The rule followed in this Court not to interfere, save on some very special ground, with a finding of facts by the lower Appellate Court on second appeal, is one which we follow with very jealous care; but in this case we cannot say that such a finding of facts, as in a case of this peculiar kind appears to us to be necessary, has been satisfactorily arrived at by the lower Appellate Court.

We have these facts: The defendant's father, a servant of the plaintiffs' father, purchases from the plaintiffs' mother, when she becomes a widow, the property in question. He purchases it shortly after the plaintiffs' father's death. The consideration money is Rs. 157. Of that consideration money, Rs. 65 admittedly remained in his hands, either with the intention or under colour

of meeting liabilities in respect of this property, incumbent on the family of the plaintiffs. The liabilities which then existed in respect of the property consisted of the rent for 1284, which was Rs. 12, and the amount payable at foot of a decree for rent for some previous years was in Bysack 1285, the date of the sale, about Rs. 31. That was payable by instalments falling due in Magh. The instalment due in the previous Magh, that is Magh 1284, had been paid by the plaintiff's father. There was therefore in Bysack 1285 no instalment due, and no urgent need of money pressing on the family in respect of this piece of land, beyond the sum of Rs. 12 for payment of the 1284 rent. We do not understand that the rest of the Rs. 65 is accounted for. As to the residue of the purchase money, two things were disputed, *one*, that there was any necessity for that money such as to justify the widow in selling the property; and, *another*, that the consideration passed.

The learned Judge has not made such findings as satisfactorily show that the plaintiffs' case must fail. He has not stated in his judgment in respect of what necessity he considers the sale to be justified. He has not adverted to the circumstance of the retention of money in the defendant's hands, which was not needed for the purpose of the family; and he has not adverted to this, that, when a servant of the plaintiffs' father purchased from the widow, his relation to the family makes it reasonable that from him or his representative should be exacted very complete proof of the necessity and of the passing of the consideration. The first Court has noticed that the writer of the deed himself, called on behalf of the defendant, has stated that no money, save Rs. 15 of the consideration money, was paid to the widow, the residue of such money as was paid having been paid to the widow's brother. We think that that was a circumstance that ought to have been dealt with in the judgment.

There are many cases in which a simple compendious finding of fact is quite enough to satisfy all requirements; but in a case of this sort, while it is our duty not to set aside clear findings of fact, save on grounds which rarely exist, we are bound to see that a proper view of the law in the case has been taken and applied by the Subordinate Court; and we do not feel satisfied

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that that has been done here. The case before us is, in its circumstances, one requiring very close scrutiny; and we are of opinion that the learned Judge has not made a satisfactory finding in respect of the question of necessity, in respect of the receipt of the consideration money by the mother of the plaintiffs, and in respect of the reality of the transaction as a sale for necessity, the purchaser purchasing on the faith of that necessity, and whether or not with full knowledge of the circumstances of the family.

We must remand the case to the lower Appellate Court for a finding upon the matters we have indicated. The costs will abide the result of the learned Judge's determination of the case on this remand.

C. D. P. *Case remanded.*

1889
May 17.

Before Mr. Justice Pigot and Mr. Justice Rampini.

RAKHAL DAS ADDY, EXECUTOR TO THE ESTATE OF LATE GOVIND CHUNDER ADDY (PLAINTIFF) *v.* DINOMOYI DEBI AND OTHERS (DEFENDANTS).*

Right of Occupancy—Suburban lands let for building purposes.

There is no authority for the proposition: "that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

Gungadhur Shikdar v. *Asimuddin Shah Biswas* (1) explained.
Ramdhun Khan v. *Haradhun Puramanick* (2) relied on.

SUIT for ejectment and khas possession.

Rakhal Das Addy brought this suit, as executor of the will of his father Gobind Chunder Addy, to eject the defendants from a piece of land about half a bigha in area, situate in the village of Chetla in the suburbs of Calcutta.

* Appeal from Appellate Decree No. 1495 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 25th of April 1888, reversing the decree of Baboo Hari Krishna Chatterjee, Munsiff of Alipore, dated the 7th of November 1887.

(1) I. L. R., 8 Cal., 960.
(2) 12 W. R., 404 : 9 B. L. R., 107 note.

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The plaintiff alleged that by a kobala dated the 29th Bhadro 1276 (13th September 1869), Doyamoni Dasi sold 1 bigha 9 cottahs of land, including the half bigha in suit, to the plaintiff's father Gobind Chunder Addy; that on the 27th Assin 1293 (12th October 1886) the plaintiff served the defendants with notice to quit by the end of the month of Choitro (April 1887); and that the defendants had not complied with the terms of such notice.

The defence was that the tenure had been sold to Dinomoyi Debi (defendant No. 1) by Gora Chand Sadhukhan, the father of the defendants Nos. 2, 3 and 4, under a kobala dated the 27th Bhadro 1274 (11th September 1867); that the tenure was agricultural and permanent; that Dinomoyi and her predecessors in title had been in possession for nearly a hundred years, and that Dinomoyi had acquired a right of occupancy in the land.

The main issues in the case were, *first*, whether any notice had been served upon the defendants and was it sufficient in law? and, *secondly*, whether the defendants had acquired a right of occupancy in the land?

The kobala of the 27th Bhadro 1274 recited that the land was held under a pottah dated 1229, and that the deeds relating to the land had all been made over by the vendor, Gora Chand, to the defendant Dinomoyi. The defendants did not produce this pottah nor the other deeds at the trial, nor attempt to account in any way for their absence.

The Munsiff held that notice to quit had been duly served upon the defendants and that it was valid in law. He found that the tenure was not a permanent one; that the land was neither agricultural nor horticultural but homestead land; and that it had been actually occupied for building purposes; and accordingly held that no right of occupancy had been acquired in the land.

The Munsiff therefore decreed the suit.

The defendant Dinomoyi and one of the other defendants appealed.

The Additional District Judge, while he agreed with the Munsiff in holding that a valid notice to quit had been duly served on

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the defendants, differed from him on the question of the right of occupancy in the land. As regards this question the learned Judge observed:

"I think it is clear that the land is not agricultural or horticultural land. It is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes.

"It does not however follow that defendants cannot have an occupancy right in it. It may not be an occupancy right of which the Bengal Tenancy Act will take cognizance, and it may be that the enhancement suits formerly instituted were brought under a mistake of law, but there are of course occupancy rights besides those recognized by the Landlord and Tenant Acts.

"The case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) seems to me in point. I cannot see any distinction between it and the present case. The buildings in that case were substantial, it is not said that they were pucca, and it appears that the buildings in the present case may fairly be called substantial. They have existed apparently for many years, and two of them have thick mud walls.

"Whether the enhancement suit was properly brought or not, its institution was certainly an admission that Gora Chand had a right of occupancy." The Judge further observed: "There may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

* * * *

"In my opinion defendants have a right of occupancy in the land, and cannot be ejected The land has been in their possession and that of their vendor and his family for about a century, and the conduct of the plaintiff in suing for enhanced rent shows that he knew the tenant had an occupancy right in it. It was leased out apparently for building purposes, and the tenant built houses and planted trees on it in accordance with the grant and on the faith of it."

The Judge accordingly reversed the decision of the Munsiff and dismissed the suit.

(1) I. L. R., 8 Cal., 960.

The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Bhobani Charan Dutt* for the appellant.

Baboo *Debender Mohun Sen* for the respondents.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was delivered by

RAMPINI, J.—This is a suit for ejectment from an area of about half a bigha of land after service of notice to quit. The land has been found by both the lower Courts not to be agricultural or horticultural land. The lower Appellate Court remarks that "it is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes." The Court of first instance gave the plaintiff a decree, but the lower Appellate Court has held that the defendants have a right of occupancy in the land in consequence of its occupation by their vendor and his family for about a century, and that, therefore, they cannot be ejected. The learned Additional District Judge cites the case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) as an authority for the view which he expresses, that "it is not only agricultural tenants that can plead occupancy rights, and that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants." But the case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) would seem to us to be no authority for such a proposition. All that is laid down in that case is that when land has been let, not for agricultural, but for building purposes, and when buildings of a substantial character have been erected on it for more than 60 years, and the defendant and his ancestors have been in occupation of it for that period, the Courts are at liberty to presume, if they think fit, that the original grant of the land was of a permanent character. Moreover, none of the rulings which have been cited in this case in any way support the view taken by the learned Additional District Judge. On the other

(1) I. L. R., 8 Cal., 960.

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hand, the contrary has been expressly held in the case of *Ramdhun Khan* v. *Haradhun Paramanick* (1), in which it has been said by Markby, J.: "It was stated that if a man (altogether independently of Act X of 1859, and even assuming that that Act would not apply) grants, we will say, a house to another for an indefinite term, the tenant, merely by occupation of it under that grant, acquires, on equitable principles (for that is what it comes to), a right for occupancy. I know of no such principle of law. If authority were needed, it seems to me that such a proposition of law was expressly repudiated by the decision of the Privy Council in a case reported in 11 Moore's Indian Appeals towards the end of the volume (2). I do not say that a grant, which was originally wholly indefinite in its terms, may not be made perpetual by the subsequent conduct of the parties, but that is a matter of fact, and no facts have been shown in this case of that kind, nor has the Court been asked to infer it. What we have been asked to hold, and what we cannot hold, to give the defendants what they ask, is, that simply by occupying under a grant for no specified period and by paying rent under it a tenant acquires a right of occupancy. I think that right is entirely confined to the special cases in which the Legislature has granted it." In no subsequent ruling has any other principle been laid down.

The learned Additional District Judge has not found that there is anything in the circumstances of this case, or the conduct of the parties, which would justify the inference that the lease originally granted to the predecessor of the defendants' vendor was of a permanent nature. He has abstained from coming to any such finding, and we think rightly so, for there would seem to us to be circumstances in the case which point to the opposite conclusion. In the *first* place, the defendants' kobala, dated 27th Bhadro 1274, recites that the land was held under a pottah dated 1229, and that the deeds relating to the land have all been made over by the vendor to the defendant No. 1. It is a most significant

(1) 12 W. R., 404: 9 B. L. R., 107 note.

(2) *Dhunput Singh* v. *Gooman Singh*, 11 Moore's I. A., 433 at p. 465.

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fact that the defendants do not produce this pottah, or attempt to account in any way for its absence. This conduct of theirs certainly lays them open to the imputation that they are purposely withholding this pottah, as it would have shown that their tenancy is not of a permanent character. *Secondly*, it is an undisputed fact in this case that the rent of the half bigha of land from which it is sought to eject the defendants has very recently been enhanced; so that no presumption in favour of the defendants from long occupation of the disputed land at a fixed and unvaried rate of rent can arise. *Thirdly*, the buildings on the disputed land are found to be but huts made of non-permanent and non-substantial materials, which can be easily removed. We therefore do not think that any presumption as to the permanent character of the original grant of the disputed land could fairly have been made in the case, or that there are any circumstances to negative the right of the landlord, as the plaintiff is admitted to be, to re-enter on the land after taking proper steps to determine the defendants' tenancy, as he has taken.

We therefore set aside the decree of the lower Appellate Court and restore that of the Court of first instance. This order carries costs in the suit in all the Courts.

C. D. P. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

IN THE MATTER OF THE PETITION OF KOILASH CHANDRA CHAKRABARTY.

KOILASH CHANDRA CHAKRABARTY *v.* THE QUEEN EMPRESS. *

1889 *May* 20.

Penal Code (*Act XLV of* 1860), *ss.* 441 *and* 456—*House breaking by night—Criminal Trespass—Intent.*

When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and when an attempt is made to capture him uses great violence in his efforts to make good his

* Criminal Revision No. 163 of 1889 against order of J. G. Campbell, Esq., Session Judge of Mymensingh, dated the 2nd of February 1889, affirming the order of Baboo Bhuban Mohun Raha, Deputy Magistrate of Netrokona, dated the 31st of December 1888.